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# The Employer's Tort Immunity: A Case Study in Post-Modern Immunity

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## I. INTRODUCTION

Like the moon across the night sky, the immunity defense has waxed and waned across the ever changing horizon of American tort law. Immunity originally was a creation of the judiciary.<sup>1</sup> The grant of immunity represented a policy determination that a certain defendant should be excused from tort liability because of its status, i.e. who or what it was. Thus, the sovereign was absolutely immune from tort liability based on its need to provide necessary public services and the fiction that the sovereign, as the creator of its courts, could not be sued in them without its consent.<sup>2</sup> Charities, most notably hospitals, were immunized from liability in tort because of the belief that immunity would encourage people to undertake charitable endeavors.<sup>3</sup> Spouses were immune from tort liability to each other because of the perceived need to preserve family harmony which, the common law reasoned, intra-family tort suits would disrupt.<sup>4</sup> All of these entities and people were immunized because of their status.

In modern times, beginning about the middle of the twentieth century, the courts which had created these immunities began to destroy them.<sup>5</sup> The judiciary found ways to circumvent the various immunities it had created<sup>6</sup> and

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1. See, e.g., *Faefees of Heriot's Hospital v. Ross*, 8 Eng. Rep. 1508 (1846). American courts followed this decision and established a general doctrine that charities were immune from tort liability.

2. *McMahan v. United States*, 342 U.S. 25, 72 S. Ct. 17 (1951); *United States v. Nardic Village, Inc.*, 503 U.S. 30, 112 S. Ct. 1011 (1992).

3. See, e.g., *Manguson v. Swedish Hospital*, 169 P. 828 (Wash. 1918); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 133 (5th ed. 1984).

4. See, e.g., *Thompson v. Thompson*, 218 U.S. 611, 31 S. Ct. 111 (1910) (barring personal actions); *Smith v. Gorman*, 41 Me. 405 (1856) (barring property damage tort claims). Additionally, in Louisiana, parents were (and are) immune from tort actions brought by (on behalf of) their minor children. La. R.S. 9:571 (1991).

5. W. Page Keeton et al., *supra* note 3, § 131.

6. See, e.g., *Howard v. Sisters of Charity of Leavenworth*, 193 F. Supp. 191, 192 (D. Mont. 1961) (cataloguing such circumvention, which includes limiting the immunity to nonpaying customers, to where there was no negligence in selection of employees, and to where the charitable institution did not have insurance).

in many cases abolished them altogether. The abolition or limitation of sovereign immunity was accomplished not only by judicial decision<sup>7</sup> but by legislative<sup>8</sup> and Constitutional<sup>9</sup> action as well. Louisiana, like her common law neighbors, struck hard at the traditional immunities. The Louisiana Supreme Court abolished charitable immunity,<sup>10</sup> and the people, in the Constitution of 1974, waived sovereign immunity from tort and contract claims.<sup>11</sup> Interspousal immunity has only partially survived in Louisiana; during marriage, the spouses are immune from suit against each other, but one spouse may bring a direct action against the other's liability insurer.<sup>12</sup>

But just as traditional immunity appears to be finally fading from the tort horizon, new moons of immunity are appearing. Unlike their predecessors, these new post-modern immunities are legislatively created. Moreover, unlike the traditional immunities, these new immunities do not insulate from tort liability broad classes of persons, such as *all* charities or *all* spouses. Instead, in many cases they protect narrowly defined classes of persons, such as members of downtown development districts,<sup>13</sup> volunteer athletic coaches,<sup>14</sup> recreational land owners,<sup>15</sup> poison control centers,<sup>16</sup> and others.<sup>17</sup> In addition, these new immunities do not protect their beneficiaries from all tort liability but only from certain types of liability, typically negligence and strict liability.<sup>18</sup> The immunity is lost if the defendant's conduct rises above negligence to some

7. See, e.g., *Colby v. Carney Hospital*, 254 N.E.2d 407 (Mass. 1969); *Howle v. Camp Aman Carter*, 470 S.W.2d 629 (Tex. 1971).

8. See, e.g., N.C. Gen. Stat. § 1 - 539.9; R.I. - G.L. 1956, § 9-1-26 (hospitals).

9. See *infra* note 11.

10. *Garlington v. Kingsley*, 289 So. 2d 88 (La. 1974).

11. La. Const. art. XII, § 10. A Supreme Court opinion expanding the waiver of sovereign immunity, see *Chamberlain v. State*, 624 So. 2d 874 (La. 1993), has been overturned by a constitutional amendment and implementing legislation. See 1995 La. Acts No. 828, which submitted to the people the subsequently approved Article XII, Sec. 10(c) of the Louisiana Constitution which gives the legislature the power to regulate the tort liability of the state. As part of Act 828, the legislature also reenacted a set of governmental limited liability statutes. The legislature has continued to tinker in this area. See 1996 La. Acts No. 63.

12. Through the direct action statute, La. R.S. 22:655 (1978 and Supp. 1989), Louisiana preserves the interspousal immunity by allowing one spouse to sue the other's liability insurer directly. *Guillot v. Travelers Indemnity Co.*, 338 So. 2d 334 (La. App. 3d Cir. 1970), *writ dismissed*, 341 So. 2d 408 (1977). When the legislature amended the direct action statute to require that in a direct action against an insurance company the plaintiff must also name the insured, it exempted cases where the insured was immune from suit. La. R.S. 22:655 (1978 and Supp. 1989).

13. La. R.S. 9:2792.2 (1991).

14. La. R.S. 9:2798 (1991). Receipt of a small stipend does not forfeit "volunteer" status. La. R.S. 9:2798 (1991).

15. La. R.S. 9:2791, 2795 (1991).

16. La. R.S. 9:2797.1 (1991).

17. See, e.g., La. R.S. 9:2798.2 (1991).

18. See, e.g., La. R.S. 9:2796.1 (Supp. 1995) (limiting all liability of any organization presenting St. Patrick's Day Parades unless the loss or damage results from gross negligence or from a wanton act).

heightened level of fault such as gross negligence, recklessness, or intentional tort.<sup>19</sup>

With its ever changing phases one may justifiably examine immunity's place in the larger sky of American tort law. Immunity may be viewed as one aspect of the "duty/risk" or scope of duty issue inherent in every tort case. There are always four core issues in the imposition of tort liability: (1) whether the plaintiff's injuries were caused-in-fact by defendant's conduct, (2) whether the defendant's conduct, activity, or relationship to the injury-causing thing or person mandates imposition of liability (i.e., has defendant breached the appropriate standard of conduct), (3) whether the liability extends to the kind of injury which occurred in the manner in which it occurred, and (4) the extent (monetary value) of the plaintiff's injuries. As a closer look reveals, the third issue—the "duty/risk" question—is at the heart of tort immunity.

Tort concepts generally will broadly "condemn" certain conduct, holding that a person who acts in a certain way (issue 2 above) and causes (issue 1) damages (issue 4) is liable to the person who suffers those damages. But when that broad rule is applied to a particular actor and victim in a particular lawsuit, the same societal policies which generated the rule may caution against imposition of liability. This is the essence of issue 3. A court must examine the specific circumstances and determine whether liability should be imposed upon *this defendant* to *this plaintiff* for *these damages* occurring in *this manner*. This "specific risk" inquiry generally is made at the "duty" or "legal causation" level, where it causes confusion and often frustration to the law student, lawyer, and judge. However, the same inquiry may be made at the "immunity" level. For example, part of the duty/risk inquiry is whether *this defendant* owes a duty to *this plaintiff*. Under traditional immunity concepts, the court made a determination that certain classes of defendants did not owe duties to avoid tortious injury. Put differently, *this defendant*, if immune, did not owe a duty to the plaintiff. Consequently there was no need to inquire further, even though that inquiry, if it had been made, would have revealed that the defendant in fact had engaged in risky behavior which caused the plaintiff to suffer injuries which otherwise would have been compensable.

One difference in making the "specific risk" inquiry under the rubric of immunity rather than through a duty or causation inquiry is the burden of persuasion. Duty and causation are elements of the plaintiff's claim, but immunity generally is treated as an affirmative defense which the defendant must plead and prove.<sup>20</sup> However, establishing one of the traditional tort immunities was generally a rather easy task. If the defendant was a charity it ordinarily was simple to establish that fact, and the defendant then was entitled to a summary

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19. *Id.*; see also La. R.S. 40:1235 (1992) (limiting the liability of emergency medical technicians unless their actions were intentional or grossly negligent).

20. See, e.g., *Conques v. Hardy*, 337 So. 2d 627 (La. App. 3d Cir. 1976) (treating judicial immunity as an affirmative defense).

determination in its favor, i.e. dismissal of the plaintiff's claim. Thus, broad traditional immunities had the advantage of being administratively convenient because they avoided trials, but they turned otherwise deserving plaintiffs away from the courthouse without recovery. Broad immunity was equated with a determination that the defendant effectively did not owe a duty to the plaintiff and that the plaintiff was precluded from getting a judge or jury to consider the particular details of his or her case. The details of the particular plaintiff's story were shrouded beneath the broad cloak of the defendant's status-oriented immunity defense. But what about the post-modern immunity rules?

While duty and causation are generally governed by judicially crafted rules, post-modern immunity has sprung from legislation. Thus, the "specific risk" inquiry at the immunity level requires statutory construction. More importantly, it involves interpretation of statutes which were usually generated by "special interest" groups seeking to escape liability under various judicially developed tort doctrines. The fact that these new immunities are legislatively created suggests that a court in a civil law jurisdiction should strive to effectuate the legislative will. On the other hand, the fact that these immunity statutes constitute "special interest" protection limiting the general right of an injured victim to recover in tort from an at-fault party suggests a strict or narrow construction. This dual but conflicting perspective on interpretation suggests the potential for conflict and disagreement.

Moreover, while Louisiana's post-modern immunities are also status-based, they generally protect narrower classes than traditional immunities, *and* they allow the plaintiff to recover if he or she can establish that the defendant's conduct was more blameworthy than mere negligence. Looked at from a duty/risk focus, the immunity is lost if the defendant's actions are sufficiently egregious. Consequently, below that level of fault the manner in which the accident occurs mandates that the defendant owed the plaintiff no duty, i.e. it is immune. However, above that level the circumstances are such that the defendant does owe the plaintiff a legal duty, and traditional tort analysis must be applied to determine if the defendant is liable to the plaintiff.

Some of the confusion surrounding the concept of immunity no doubt has been caused by the fact that tort immunity has appeared in several different forms, all often indiscriminately called "immunity" with little or no further discussion. Immunity essentially may prevent a tort from arising; sovereign immunity is the classic example here. The defendant is immune from liability for all torts because of who it is—an "across the board," status-oriented freedom from tort liability. In the duty/risk parlance, the defendant owes no duty regardless of the circumstances. This type of immunity rarely survives today. In another type of immunity, the tort arises but the immunity suspends judicial enforcement for a period of time. In Louisiana, the interspousal<sup>21</sup> and parental immunities<sup>22</sup> are the most common of these. The tort is committed but it may

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21. La. R.S. 9:291 (1991).

22. La. R.S. 9:571 (1991).

not be enforced against the tortfeasor during the pendency of the immunity-triggering relationship.<sup>23</sup> However, prescription also may be suspended during the existence of the key relationship.<sup>24</sup> In a third kind of immunity, as discussed above, the actor is immune from some kinds of tortious conduct but not others. The employer's immunity is the best known example. An employer generally is immune from tort liability for his negligent injury to an employee but since 1976<sup>25</sup> the immunity is lost if the employer's fault reaches the egregious level of intent.<sup>26</sup> The employer's immunity (and its inapplicability to intentional torts) is paradigmatic of recent Louisiana immunity legislation,<sup>27</sup> which reveals the "form" of many of Louisiana's post-modern immunity statutes. Unlike some of the other post-modern immunities, the employer immunity protects a broad class, *all* employers. A fourth kind of tort immunity limits the amount of damages the actor must pay or the manner of payment. This is reflected in statutes limiting the amount of tort liability of public bodies<sup>28</sup> and health care providers.<sup>29</sup> It also appears in statutes "structuring" the payment of certain damages in future installments against both governmental entities<sup>30</sup> and qualified health care providers.<sup>31</sup> Finally, one may view as immunity statutes those which shorten the tort prescriptive periods<sup>32</sup> or which establish peremptive periods<sup>33</sup> for certain claims against certain defendants. Because immunity

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23. See, e.g., *Myhre v. Erler*, 575 So. 2d 519 (La. App. 5th Cir. 1991) (interspousal immunity does not bar suit after divorce even though it was filed before divorce).

24. La. Civ. Code art. 3469; *Schexnayder v. Schexnayder*, 451 So. 2d 1192 (La. App. 5th Cir. 1984).

25. 1976 La. Acts No. 147 (amending La. R.S. 23:1032).

26. La. R.S. 23:1032 (1991).

27. Actually, La. R.S. 9:2791 (1991) and 9:2795 (1991) (the recreational landowner immunity statutes) predate the intentional act exception to employer immunity. Both of those statutes limit immunity to conduct that is not "malicious." However, while the recreational land statutes may be the earliest examples of "limited" immunity legislation, the employer's immunity and the intentional act exception have attracted and demand more practical attention.

28. La. R.S. 13:5106 (Supp. 1996). An initial "ceiling" on the sovereign's liability for tort damages was declared unconstitutional in *Chamberlain v. State*, 624 So. 2d 874 (La. 1993). The 1995 constitutional amendment allowed the legislature to place limits upon the sovereign's liability. The amendment presumably validates the new \$500,000 "cap" (see 1996 La. Acts No. 63); however, suits filed against the sovereign prior to Jan. 1, 1996, probably are not subject to any "cap." See, e.g., *Begnaud v. DOTD*, 631 So. 2d 467 (La. App. 5th Cir.), writ denied, 675 So. 2d 1087 (1996); *Holt v. State*, 671 So. 2d 1164 (La. App. 2d Cir. 1996).

29. See La. R.S. 40:1299.42 (1992) (limiting malpractice liability of health care providers and Louisiana Patients' Compensation Fund to \$500,000, exclusive of future medical care and related benefits).

30. See, e.g., La. R.S. 13:5114 (1996) (structuring payment of a judgment or compromise against the state or its political subdivisions).

31. La. R.S. 40:1299.43 (1991) (regarding payment of future medical expenses).

32. La. R.S. 9:5628 (1991 & 1996 Supp.).

33. See, e.g., La. R.S. 6:1191 (Supp. 1995) (creating a peremption for claims against officers or directors of a savings bank), La. R.S. 9:5605 (1991 & Supp. 1996), and La. R.S. 9:5606 (Supp. 1996).

statutes treat certain actors or victims, or both, differently from other actors or victims, immunities present nice questions of constitutional law, some of which are as yet unanswered.<sup>34</sup>

This article focuses upon the most important of all Louisiana immunities, the employer's immunity from non-intentional work place torts. Not only is the immunity practically significant in its own right, but the manner in which the courts approach the scope and applicability of the employer's immunity may provide the best insight into how they will treat the post-modern wave of limited immunity statutes. Moreover, the employer immunity jurisprudence nicely illustrates the omnipresence of the duty/risk mode of analysis in the field of immunity.

In the sections which follow we strive to do several things. First, we provide the bench and bar with practical information concerning this most important of all Louisiana immunities. Second, we examine the employer's immunity as the model for other post-modern immunities with which Louisiana courts must now deal. Finally, we attempt to demonstrate how employer immunity issues may be seen as duty/risk or scope of duty issues.

## II. THE EMPLOYER'S IMMUNITY

The most significant and most volatile of tort immunities is that which the employer enjoys for workplace injuries to his or her employee. Given the magnitude (both in number and severity) of workplace injuries, it is not surprising that the employer's immunity has generated an avalanche of litigation and a galaxy of jurisprudence. The genesis of the immunity is statutory<sup>35</sup> and the story of the immunity's legislative creation is critical to an understanding of how courts have treated it. Prior to the turn of the twentieth century, the common law imposed upon the employer a duty to exercise reasonable care to provide a safe work place to its employees—a duty *not* to be negligent. However, the scope of that duty was drastically limited by the defenses available to employers sued in tort by their employees. The employer, despite its duty to provide a safe work place, was effectively "immunized" from liability through contributory negligence, assumption of the risk, and the fellow servant rule.<sup>36</sup> This state of affairs led to progressive legislation codifying the employer's obligation to provide a safe work place *and* creating worker's compensation, a form of "absolute" liability imposed upon the employer for limited benefits (traditionally two-thirds of the employee's weekly wages during the period of disability and medical expenses).<sup>37</sup> These benefits

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34. Others are resolved. See, e.g., *Moore v. RLCC Technologies, Inc.* 668 So. 2d 1135 (La. 1996) (the extension of tort immunity beyond a direct employer does not violate rights to equal protection under the Louisiana Constitution).

35. La. R.S. 23:1032 (1991).

36. These three defenses created the "unholy trinity," which made recovery for work-related injuries uncommon. See *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 658-59 (6th Cir. 1979).

37. See, e.g., *Wex S. Malone & H. Alston Johnson, III, Worker's Compensation* §§ 1 and 32, in 13 La. Civil Law Treaties (1980 and Supp. 1993).

generally were recoverable when the employee was accidentally injured during the course and scope of employment and the injury arose out of the employment.<sup>38</sup> In exchange for this absolute "no fault" recovery, the employee forfeited the right to maintain an action for tort damages against the employer.<sup>39</sup> To use a Latin term, the legislature struck a "quid pro quo" compromise: the employee received an absolute right to recover limited benefits in exchange for the employer's tort immunity. In duty/risk parlance, the employer traded in its tort duty for *no* tort duty *but* an absolute obligation to provide limited worker's compensation benefits.

The employer's liability was conditioned upon the employee's "accidental" workplace injury; however, if the employer's injuring conduct was "intentional," the resulting injury was not "accidental," compensation was not due, and there was no corresponding immunity from tort damages.<sup>40</sup> In post-modern terminology, the immunity was limited; it did not extend to intentional torts. If the tort was intentional, a tort duty was owed and breached.

An accidental injury is compensable under the worker compensation statutes if it occurs in the course and scope of employment,<sup>41</sup> arises out of the employment,<sup>42</sup> and disables<sup>43</sup> the employee (or prevents him or her from earning 90%<sup>44</sup> of his or her pre-accident wages). The "course and scope" requirement employs the same language courts use in determining whether a master (employer) is vicariously liable for the torts of his servant (employee).<sup>45</sup> In both contexts the court is attempting to determine whether the risk of injury to the employee in the compensation context or to a third person in the vicarious liability context is one which is attributable to the employer's enterprise.

Generally, when used in the worker's compensation context, "course and scope" refers to the time and place of the accident,<sup>46</sup> and "arising out of" focuses upon the risk involved.<sup>47</sup> Is that risk employment related? Is the employee, because of his employment, exposed to the risk more than other

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38. See, e.g., *Turpin v. Turpin Electric, Inc.*, 904 S.W.2d 539 (Mo. Ct. App. 1995).

39. See *Billiot v. B.P. Oil Co.*, 645 So. 2d 604 (La. 1994); *Baunhill v. American Well Service and Salvage, Inc.*, 432 So. 2d 917 (La. App. 3d Cir. 1983).

40. Cf. *Li v. C. N. Brown Co.*, 645 A.2d 606 (Me. 1994) (workers' compensation statute no longer requires injuries to have been accidental under the Act).

41. See, e.g., La. R.S. 23:1031 (Supp. 1995).

42. La. R.S. 23:1031 (Supp. 1995).

43. See, e.g., *Guidry v. Sline Indus. Painters, Inc.*, 418 So. 2d 626 (La. 1982); *King v. Wilson Bros. Drilling Co.*, 441 So. 2d 68 (La. App. 3d Cir.), writ denied, 443 So. 2d 598 (La. 1983); *Poindexter v. South Coast Corp.*, 204 So. 2d 615 (La. App. 4th Cir. 1967).

44. La. R.S. 23:1221 (1991 & Supp. 1996); *Pinkins v. Cardinal Wholesale Supply, Inc.*, 619 So. 2d 52 (La. 1993).

45. See, e.g., *Reed v. House of Decor, Inc.*, 468 So. 2d 1159 (La. 1985).

46. See, e.g., *Martin v. State Farm Mutual Automobile Ins. Co.*, 108 So. 2d 21 (La. App. 2d Cir. 1958).

47. See, e.g., *Guidry v. Sline Industrial Painters, Inc.*, 418 So. 2d 626 (La. 1982). The *Guidry* court explained that "[a]rising out of employment contemplates the accidents being the result of some risk to which the employee is subjected in the course of his employment and to which he would not have been subjected had he not been so employed." *Id.* at 628.



persons are?<sup>48</sup> The employee seeking compensation (and the employer claiming tort immunity) must establish both the "course and scope" and "arising out of" elements. However, the Louisiana Supreme Court views those elements as if they were along a continuum. They must be construed together, and a relatively weak showing on one requirement may be overcome by a strong showing on the other.<sup>49</sup>

Theoretically, the "course and scope"/"arising out of" requirements may be seen, from a duty/risk prospective, as the *manner* in which the accident occurred. Put differently, an employer (this defendant) owes *no* non-intentional tort duty to the employee (this plaintiff) if the accident occurred during the course and scope of employment and arose out of the employment (this manner).<sup>50</sup> Of course, the result changes if the manner changes, such as if the employee was not in the course and scope of employment, or the injury did *not* arise out of the employment. In such case, the employer *may* owe a tort duty to the employee to protect against the relevant injury. Whether it does so depends upon general tort law, *not* upon immunity. Interestingly, the risk is analyzed first to see if it arose out of employment (a type of duty/risk analysis). If it did, the employer is immune from a non-intentional tort suit. If it did not, then the manner in which the accident occurred defeats the employer's immunity defense. Then, the court must engage in a duty/risk analysis to see if the employee may recover in tort. Let us examine some of these concerns a little more closely.

What happens when there may be employer fault and it is not clear that the injury occurred in the "course and scope" of employment and "arose out of" the employment? In such a case, the employee may elect to proceed in tort rather than seek worker compensation because of the more generous recovery available. Thus, the lawyer representing the injured employee must proceed with caution because proving one's entitlement to proceed in tort may foreclose a later compensation claim arising out of the same conduct. In close cases, a court may find the employee "in" or "out" of the course and scope, depending upon whether the result will provide some kind of compensation to the employee for his injury. This is particularly true in those cases, largely fact specific, in which the employee is injured near his or her work station shortly before or after the work shift. A court may find the employee "outside the course and scope of employment" if there is employer or solvent third party fault, but "inside" if

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48. *Id.*

49. *Mundy v. Department of Health & Human Resources*, 593 So. 2d 346 (La. 1992).

50. This conclusion is somewhat troublesome after 1996 La. Acts No. 3. Now, when an injured worker sues a third party tortfeasor, the tortfeasor is entitled to have fault allocated to an at fault employer. The statement in the text about "no duty" to the employee should not be read to indicate the employer in a third party tort suit is not at fault. Our "no duty" statement should not influence such cases. It is made to show the possibility of analyzing all tort problems from the duty/risk perspective. But merely because a plaintiff (the employee) cannot recover from a defendant (the employer) does not mean that "fault" may not be allocated to the employer for some other reason, such as reducing the third party defendant's liability.

there is none.<sup>51</sup> While this judicial approach generally fosters the societal goal of compensating the accident victim, the employee may face the "worst case" scenario: the employer fault and course and scope issues are close ones, but a court ultimately determines that the employee was outside the course of employment so the employee can proceed with his tort suit, but the court may decide the employer was *not* negligent or the employer's negligence did not extend to the particular risk. For instance, in *Mundy v. State Department of Health and Human Resources*,<sup>52</sup> the plaintiff, a nurse working at the then Charity Hospital in New Orleans, was attacked and stabbed in an elevator at the hospital while she was en route to the floor on which she worked. Although her shift had begun about two minutes before the incident, her employer would not have considered plaintiff as tardy for another several minutes. The court of appeal decided that plaintiff's exclusive remedy was worker compensation benefits.<sup>53</sup> The Supreme Court reversed,<sup>54</sup> thus allowing plaintiff to proceed in tort against her employer. Then, on remand, the court of appeal concluded that the employer did not owe a duty to protect plaintiff (or anyone else) from the risk which occurred.<sup>55</sup> Consequently, plaintiff was unable to recover in tort.<sup>56</sup> One assumes that the Supreme Court's decision that Mundy's injury did not arise out of and/or occur in the course and scope of her employment also precluded any subsequent recovery of compensation benefits.

The message of *Mundy* is clear. The lawyer must be aware that if a workplace injury does not occur in the course and scope of employment and arise out of the employment, the employee may have a tort claim against the employer. Alternatively, a decision to pursue tort recovery also may effectively foreclose a later claim for compensation benefits. *Mundy* also brings to mind

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51. *Stewart v. Louisiana Plant Service, Inc.*, 611 So. 2d 682 (La. App. 4th Cir. 1992), *writ denied*, 616 So. 2d 706 (La. 1993).

52. 593 So. 2d 346 (La. 1992).

53. *Mundy v. Department of Health & Human Resources*, 580 So. 2d 493 (La. App. 4th Cir. 1991), *reversed*, 593 So. 2d 346 (1992).

54. *Mundy v. Department of Health & Human Resources*, 593 So. 2d 346 (La. 1992).

55. *Mundy v. Department of Health & Human Resources*, 609 So. 2d 909 (La. App. 4th Cir. 1992).

56. *Cf. Bosse v. Westinghouse Electric Inc.*, 637 So. 2d 1157 (La. App. 4th Cir.), *writ denied*, 642 So. 2d 878 (1994) (employee injured in elevator at his office building 45 minutes before shift began was in course and scope of employment at the time of the injury); *Stewart v. Louisiana Plant Service, Inc.*, 611 So. 2d 682 (La. App. 4th Cir. 1992), *writ denied*, 616 So. 2d 706 (1993); *Tuminello v. Willis Knighton Medical Center*, 597 So. 2d 1089 (La. App. 2d Cir.), *writ denied*, 600 So. 2d 684 (1992) (exclusive remedy in comp). For Professor Maraist's synopses of these cases, see Frank L. Maraist, *Louisiana Tort Law: Cases and Materials* 362-63 (1995 ed.). See also *May v. Sisters of Charity of the Incarnate Word*, 651 So. 2d 375 (La. App. 2d Cir.), *writ denied*, 654 So. 2d 329 (1995). More recently, the Supreme Court held that, under La. R.S. 23:1031(D), a gas station worker shot by her husband while she was on the job was not entitled to workers' compensation benefits. The source of her injury was a personal "dispute." Justice Johnson dissented. *Guillory v. Interstate Gas Station*, 653 So. 2d 1152 (La. 1995). After the holding, one wonders whether Ms. Guillory might have asserted a tort claim against her employer.

another practical ramification of the "arising out of/course and scope of employment" requirements. The employee who seeks worker's compensation benefits bears the burden of proving that the accidental injury occurred in and arose out of the course and scope of employment. However, if the employee seeks tort recovery from the employer and the employer claims immunity under the compensation statute's exclusive remedy provision, the employer bears the burden of proving that the employee's accidental injury arose out of and occurred in the course and scope of employment. Likewise, *Mundy* reminds us of the importance of scope of duty analysis in this area. The court of appeal had concluded that because of the manner in which the accident occurred regarding course and scope and arising out of employment, the employer did not owe the employee a duty in tort (negligence) but was immune. The duty owed was to provide workers' compensation benefits. The Supreme Court disagreed, concluding that the manner in which the accident occurred was such that a duty in tort might be owed; at least there was no immunity. After this determination was made, the case became an ordinary tort case, albeit one by an employee. Sadly for the plaintiff, the courts decided that the employer's duty to exercise reasonable care did *not* include the risk which occurred. Therefore, at the end of the day in *Mundy*, the employer did not owe Ms. Mundy *any* duty (no tort duty and no duty to provide compensation benefits).

An employer seeking to establish immunity must not only show that the employee's accidental injury occurred in the course and scope of employment and arose out of the employment, but also must establish the other requirements for payment of worker compensation. If the injury is not compensable (such as when it is excluded because of employee misconduct<sup>57</sup> or because the employee cannot meet the heightened requirement of proof of disability<sup>58</sup>), the employer has no tort immunity. As noted earlier, the imposition of compensation liability on employers and the corresponding grant of tort immunity was a quid pro quo. However, if there is no "quid" of compensation benefits, there is no corresponding "quo" of immunity. This "coverage" issue is another aspect of the "manner" in which the injury occurred. If the manner of the accident was such that the employee could recover compensation benefits, the employer does not owe the employee a tort duty to guard against non-intentional torts. If there is *no* coverage then a tort duty may be owed depending upon the facts as analyzed from a tort rather than a compensation perspective.

This "compensable injury" issue has taken on added significance since 1989 when the legislature drastically rewrote the worker's compensation statutes to make it more difficult for employees to recover benefits.<sup>59</sup> For example, an

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57. See, e.g., La. R.S. 23:1208 (Supp. 1995) (providing that misrepresentation in obtaining or defeating any benefit or payment forfeits claimants rights to benefits).

58. See, e.g., La. R.S. 23:1221(1)(c) (Supp. 1995) (requiring clear and convincing evidence of temporary total disability, unavoids by any presumption of disability), *Campbell v. Luke Construction Co.*, 465 So. 2d 688 (La. 1985).

59. 1989 La. Acts No. 454.

employer is not liable for certain workplace injuries unless the employee can demonstrate the right to recover benefits by "clear and convincing" evidence.<sup>60</sup> What if the employee cannot meet that burden of proof, but the employer's negligence was a cause-in-fact of the workplace injury? Because the injury is not compensable, there is no "quid" for the "quo," and the employer is not immune from tort liability. However, there is a duty in tort, and the employer must pay tort damages to his employee for a negligently caused workplace injury. The courts have reached this result on several occasions.<sup>61</sup>

The employer's "no quid/no quo" exposure to tort liability undoubtedly is a judicial response to the severe restrictions on worker compensation recovery imposed by late twentieth century legislation. Another judicial response to this anti-compensation legislation is to interpret such statutes narrowly and thus expand compensation coverage. Absent expansion of coverage, the employee who suffers a workplace injury in which there is arguably employer fault and which is on the "fringe" of coverage for worker compensation benefits may take two strategic "bites" at the apple. He first may claim compensation and, if unsuccessful, he may then seek tort damages within a year of the final resolution of his compensation claim. The tort claim would not be prescribed because the filing of the compensation claim would interrupt prescription on the tort claim.<sup>62</sup>

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60. See, e.g., La. R.S. 23:1221(1)(c) (Supp. 1995).

61. One of the hottest current areas for brouhahas over the coverage/tort issue relates to heart attacks and perivascular injuries. See La. R.S. 23:1021(7)(e) (Supp. 1996). In *Hunt v. Milton J. Womack, Inc.*, 616 So. 2d 759 (La. App. 1st Cir.), writ denied, 623 So. 2d 1309 (1993), a panel of the first circuit held that a worker who suffered a heart attack for which no coverage was provided under the new heart attack statute was entitled to proceed in tort against the employer. In a footnote, note 17, in a later case, *Charles v. Travelers Ins. Co.*, 627 So. 2d 1366, 1372 n.17 (La. 1993), the Louisiana Supreme Court apparently endorsed the reasoning in *Hunt*. Justice Marcus concurred. 627 So. 2d 1366, 1372 (Marcus, J., concurring). While Justice Marcus agreed with the holding of the case itself (a stroke is a perivascular injury under the statute), he disagreed with the footnote endorsing *Hunt*. Interestingly, since *Charles*, the Supreme Court has interpreted the heart attack statute as providing coverage to a worker with a pre-existing, but unknown, heart condition. *Harold v. La Belle Maison Apartments*, 643 So. 2d 752 (La. 1994); see also *Debona v. Alexandria Pawn*, 649 So. 2d 449 (La. App. 3d Cir. 1994), writ denied, 650 So. 2d 242 (1995).

What if the employee forfeits his or her right to compensation benefits through some misconduct, such as intoxication or misrepresentation? Does that forfeiture, which means no compensation benefits, entitle the employee to pursue a tort claim? What if coverage is excluded because it arose out of a personal dispute? See *Guillory v. Interstate Gas Station*, 653 So. 2d 1152 (La. 1995). May the employee then file suit against the employer for failing to exercise reasonable care to protect the employee from the relevant (personal) risk of harm? The answer would seem to depend upon the law of negligence as the employer's immunity would not bar the suit.

The grandmother of this line of cases in Louisiana is *Boyer v. Crescent Paper Box Factory, Inc.*, 143 La. 368, 78 So. 596 (La. 1918).

62. See, e.g., *Williams v. Sewerage & Water Board of New Orleans*, 611 So. 2d 1383 (La. 1993); *Parker v. Southern American Ins. Co.*, 590 So. 2d 55 (La. 1991). However payment of compensation benefits may not be an acknowledgement which interrupts prescription. Compare *Gary v. Camden Fire Ins. Co.*, 676 So. 2d 553 (La. 1996) and *Cormier v. Clemco Services Corp.*, 48 F.3d 179 (5th Cir. 1995).

The two "bites" result from judicial decisions that view the worker compensation scheme as overly restrictive.

That perception also may partially be the cause of another judicial inroad into employer immunity. Assuming a compensable injury, the employer's immunity is limited in several other ways. The most important is that the employer is not immune from tort suits by the employee if the conduct chargeable to the employer was an "intentional act."<sup>63</sup> He also may not be immune from tort suits by third persons who are injured by his conduct toward his employee.<sup>64</sup> A third judicial breach in the employer's wall of immunity—liability for punitive damages—apparently has been closed by legislative action.<sup>65</sup>

As noted above, the employer's liability to the employee for intentional torts originally arose out of logical interpretations of worker compensation statutes. Those statutes generally impose liability upon the employer for compensation for "accidental injury" to the employee.<sup>66</sup> But if the employer intends to harm the employee, the injury is not "accidental"; thus, there is no compensation coverage and no corresponding immunity from tort damages.<sup>67</sup> That "intentional tort" theory did not develop initially in Louisiana, arguably because another approach, executive officer liability, effectively produced employer tort liability for tortious workplace conduct causing injury to the employee.

Prior to 1975, in Louisiana the employer was immune from tort liability but the injuring co-employee was not.<sup>68</sup> Seizing upon this distinction, Louisiana courts developed the "executive officer" doctrine which permitted an employee to recover from the employer for co-employee negligence. In duty/risk parlance, the executive officer conundrum raised a "this" defendant problem. If "this" defendant was the employer, no duty was owed (assuming coverage). If "this" defendant was an executive officer, a *tort* duty was owed. Recovery in such cases was achieved in this manner: (1) if the employer delegated workplace safety to a particular employee, that employee owed a tort duty of reasonable care to fellow employees;<sup>69</sup> (2) the "executive officer" to whom the duty had been delegated usually was an "omnibus insured" under the employer's liability

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63. La. R.S. 23:1032 (Supp. 1995); *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981); *White v. Monsanto Co.*, 585 So. 2d 1205 (La. 1991).

64. See, e.g., *Cushing v. Time Saver Stores, Inc.*, 552 So. 2d 730 (La. App. 1st Cir. 1989), *writ denied*, 556 So. 2d 1281 (1990) (employer not immune from tort suit by child injured in utero by mother's workplace accident). See also *Trahan v. Trans-Louisiana Gas Co., Inc.*, 618 So. 2d 30 (La. App. 3d Cir. 1993) (tort immunity does not bar claim by worker's spouse that she sustained injuries from exposure to hazardous chemicals which became attached to her worker-husband's clothing in workplace).

65. 1995 La. Acts No. 832 (amending La. R.S. 23:1032 to overrule *Billiot v. B.P. Oil Co.*, 645 So. 2d 604 (La. 1994)); 1996 La. Acts No. 2 (repealing La. Civ. Code art. 2315.3).

66. *Billiot v. B.P. Oil Co.*, 645 So. 2d 604 (La. 1994).

67. *Malone & Johnson*, *supra* note 37, § 32.

68. *Id.* at § 365.

69. See, e.g., *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973).

insurance policy; (3) under the "direct action" statute, the injured employee could bring suit against the employer's insurer<sup>70</sup> (for the "executive officer's negligence") without joining the employer; and (4) the employer's tort immunity did not extend to its liability insurer.<sup>71</sup> Thus, the employer who was absolutely liable for worker compensation benefits also bore the cost, through increased liability insurance premiums, of the employee's tort recovery against the injuring "executive officer."

The legislature changed this result in 1976 when it extended tort immunity to an injuring co-employee who was in the "normal" course and scope of his employment.<sup>72</sup> It made the executive officer a member of the class of "this" defendant who might be immune. Probably as a trade-off, the same legislation, however, made both the employer and the injuring employee liable to the injured employee in tort for an "intentional act."<sup>73</sup> The Supreme Court quickly chose the wise interpretation of "intentional act" as synonymous with "intentional tort," a concept well developed at common law.<sup>74</sup> Under that concept, an actor's conduct is intentional if: (1) he subjectively desires to invade a protected interest or (2) he acts under such circumstances that his conduct is "substantially certain" to invade a protected interest.<sup>75</sup> The "protected interest" may be the victim's body (battery) or mind (assault or intentional infliction of emotional distress) or both (false imprisonment). However, the "intentional tort" which falls outside employer immunity should not be confined to the traditional common law "categories" of intentional tort; the issue should be whether, under the circumstances in which he acted, the employer or injuring employee desired or was substantially certain that his conduct would invade an interest which the law protects from intentional invasion. Predictably, many of the cases are close ones which turn upon the specific facts. While the 1976 legislation expanded the class of "these defendants" protected by "employer" immunity, by allowing employee intentional tort suits against employers and co-employees it also dealt with yet another "this manner" concern. This defendant, employer or co-employee, may

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70. *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981).

71. *Id.*

72. 1976 La. Acts No. 147 (amending La. R.S. 23:1032).

73. The 1976 amendment to La. R.S. 23:1032 provided that the rights and remedies granted the employee were exclusive of all other rights and remedies of such employee against any employee of the employer, but that the immunity did not apply to "any . . . employee . . . who is not engaged at the time of the injury in the normal course and scope of his employment."

74. *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981).

75. See La. R.S. 23:1032 (Supp. 1995). See also *Caudle v. Betts*, 512 So. 2d 389 (La. 1987); *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981). Basically, intent for purposes of the worker's comp immunity means the same as intent in traditional intentional tort cases, although there has been much litigation on the intent issue. While the issue of intent is generally beyond the scope of this work, one should note, in reference to narrow construction, that the fourth circuit has held that where an employee alleges an intentional tort in a suit against an employer, the trial court may not grant an exception of no cause of action. *McKee v. Inspectorate America Corp.*, 636 So. 2d 305 (La. App. 4th Cir.), writ denied, 643 So. 2d 144 (La. 1994).

owe a duty in tort (intentional tort) to protect this plaintiff employee from the injuries which occurred if *the manner* of injury is an intentional tort. If the manner in which the injury occurred was not an intentional tort then (assuming compensation coverage) the employer is immune from suit in tort but owes a duty to provide compensation benefits.

As noted, the injuring co-employee is not immune if his conduct was intentional. If under respondeat superior principles the injuring employee's intentional conduct was within the course and scope of his employment,<sup>76</sup> the employer will be vicariously liable for the damages and will not be immune. Thus in *Benoit v. Capitol Manufacturing Co.*,<sup>77</sup> two employees bickered over the temperature in the workplace; one employee wanted a door open to cool the workplace, and the other wanted the door closed to warm it up. The disagreement accelerated into a scuffle, and the losing employee sued the employer in tort, claiming that the employer was vicariously liable for the co-employee's intentional tort. The Supreme Court concluded that although both employees were in the course and scope of employment for worker compensation purposes, the injuring employee was not immune because his conduct was intentional. Moreover, because the injuring employee was acting in the course and scope of his employment for respondeat superior purposes, the employer was liable to the injured employee for tort damages. In *Benoit* the "this manner" aspect of the duty/risk analysis involved *both* a co-employee's intentional tort and the employer's vicarious liability. Once the court determines a co-employee committed an intentional tort, the vicarious liability issue is a simple tort issue; immunity does not cloud the analysis.

An employee injured in the course and scope of employment ordinarily will begin receiving worker compensation payments from his employer or the employer's compensation insurer within a short time after the injury.<sup>78</sup> Recovery of compensation benefits does not preclude the employee's subsequent intentional tort suit against the employer; if the employee is successful in the tort suit, the employer is entitled to a credit for those portions of the worker compensation benefits which represent items of recoverable tort damages.<sup>79</sup>

What if the conduct falls below the "intentional tort" standard but is more egregious than ordinary negligence? Louisiana law imposes tort liability for punitive damages upon persons acting in a "wanton" or "reckless" manner while engaging in certain activities, such as driving while intoxicated<sup>80</sup> and, before 1996, while storing, handling, or transporting hazardous materials.<sup>81</sup> Does the employer's immunity extend to that liability? The Supreme Court answered that

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76. See, e.g., *Bradshaw v. Anco Insulation, Inc.*, 450 So. 2d 733 (La. App. 5th Cir. 1984). Compare *Baumeister v. Plunkett*, 673 So. 2d 994 (La. 1996).

77. 617 So. 2d 477 (La. 1993).

78. La. R.S. 23:1201 (Supp. 1995).

79. *Gagnard v. Baldrige*, 612 So. 2d 732 (La. 1993).

80. La. Civ. Code art. 2315.4.

81. Former La. Civ. Code art 2315.3, *repealed by* 1996 La. Acts No. 2.

question in the negative in the highly controversial case of *Billiot v. B. P. Oil Co.*,<sup>82</sup> ruling that an employer whose conduct was "wanton" or "reckless"<sup>83</sup> in the handling of a hazardous substance was liable to its employee for punitive damages.<sup>84</sup> The result has been legislatively overturned not once, but twice; first, the legislature amended the employer immunity statute<sup>85</sup> to overrule *Billiot*. Then, in 1996, the legislature<sup>86</sup> repealed Civil Code article 2315.3, which provided for punitive damages in hazardous materials cases.<sup>87</sup>

There is one other way in which the employer may lose its immunity. Louisiana Revised Statutes 23:1032 provides immunity to the injuring employee who is in the "normal" course of employment. What if the *injuring* employee is in the course and scope of his employment for the purposes of respondeat superior, but the *injured* employee is *not* in the "normal" course of his employment for the purpose of employer immunity under Louisiana Revised Statutes 23:1032? In such a scenario, the employer theoretically can be liable to the injured employee for tort damages caused by a merely negligent co-employee. The "*manner*" of harm is such that the injured employee may proceed in tort.

The workplace injury to the employee also may cause harm to the employee's family members. If the employee is killed, some family members may be compensated through the worker compensation scheme, and the employer correspondingly is immune from tort suit by those family members.<sup>88</sup> But what if the family member is not compensated, such as where the employee is killed but the family member is a non-dependent, or where the employee is only injured? The classic case is the loss of consortium claim by the spouse of an injured worker. The early jurisprudence holds that the employer's immunity extends to the consortium claims,<sup>89</sup> but that result is suspect, both in its logic and in the light of language in *Billiot v. B. P. Oil Co.* The logic of extending employer immunity to consortium claims is based upon the assumption that the consortium claim is "derivative" of the worker's personal injury claim; since the

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82. 645 So. 2d 604 (La. 1994).

83. Such conduct, somewhere between negligence and intent, requires a showing that the injuring employer or co-employee was "consciously indifferent" to the harm that his conduct would cause the injured employee or that the defendant acted in a highly unreasonable manner in the face of a grave risk of harm.

84. 1995 La. Acts No. 432 amended La. R.S. 23:1032(A)(1)(a) to provide that except for intentional acts the employee's compensation benefits "shall be exclusive of all other . . . claims for damages, including . . . punitive or exemplary damages, unless such . . . damages are created by a statute, whether now existing or created in the future, expressly establishing same as available to such employee."

85. 1995 La. Acts No. 432.

86. See, e.g., *Lyon v. Cobena*, 391 So. 2d 8 (La. App. 4th Cir. 1980).

87. 1996 La. Acts No. 2.

88. See, e.g., *Minvielle v. Kaiser Aluminum & Chemical Corp.*, 766 F.2d 189 (5th Cir. 1985).

89. See, e.g., *Mundy v. Kulkoni, Inc.* 503 So. 2d 66 (La. App. 5th Cir. 1987); *Minvielle v. Kaiser Aluminum & Chem. Co.*, 766 F.2d 189 (5th Cir. 1985).



employer is immune from the root claim, it also is immune from the derivative claim. This rationale arguably is logical in the common law jurisdictions in which the consortium claim developed as part of the trauma victim's loss of his wife's services, which the common law treated as the trauma victim's "property." Even in those jurisdictions, however, calling the claim "derivative" can be viewed as legal technicality. In Louisiana, the consortium claim sprang full-blown from 1982 legislation,<sup>90</sup> and the "derivative" argument is specious. The injured worker's spouse may sustain real damage because of the worker's injury but is not necessarily compensated out of the injured worker's compensation benefits. In addition, and most importantly, in *Billiot* the Supreme Court indicated that the employer's immunity extended only to those claims which existed at the time the legislature established the immunity—1914.<sup>91</sup> Thus the immunity arguably should not extend to the consortium claim which was created by statute several generations later. Perhaps the fairest result would be to allow consortium claims for those elements of consortium for which the injured employee is not compensated by worker compensation, such as the consortium plaintiff's loss of society. This is the result the United States Fifth Circuit court of appeals reached in maritime cases before a 1991 Supreme Court case<sup>92</sup> which has been interpreted to limit consortium claims in maritime law.<sup>93</sup>

What about the mental anguish claims of the injured Louisiana worker's family? There are two important factual scenarios in which family member mental anguish claims may arise. One is where the worker's family member witnesses the worker's workplace accident or comes upon the scene shortly thereafter. These events may give rise to a "bystander" mental anguish claim under *Lejeune v. Rayne Branch Hospital*<sup>94</sup> and Civil Code Article 2315.6. The other possibility is when the employer's faulty conduct presents a "special likelihood" of directly causing severe mental anguish to the employee's family member. This situation arose in *Vallery v. Southern Baptist Hospital*<sup>95</sup> where a hospital employee, while assisting in the restraint of a patient, was exposed to the patient's body fluids. That night the employee returned home and engaged in unprotected sex with his spouse. The following day, the employer advised the

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90. 1982 La. Acts No. 202 amended La. Civ. Code art. 2315 to add the following language: "Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person."

91. 645 So. 2d at 606.

92. *Miles v. Apex Marine*, 498 U.S. 19, 111 S. Ct. 317 (1990).

93. Any effect *Miles* may have had on consortium claims may have been drastically limited by *Yamaha v. Calhoun*, 116 S. Ct. 619 (1996).

94. 556 So. 2d 559 (La. 1990).

95. 630 So. 2d 861 (La. App. 4th Cir. 1993), *writ denied*, 634 So. 2d 860 (1994) (although the consortium claim was barred, the wife did have a claim for injuries attributable to her fear of developing AIDS from her husband who was exposed at the workplace; this was her own independent tort claim); see also *Raney v. Walter O. Moss Regional Hospital*, 629 So. 2d 485 (La. App. 3d Cir.), *writs denied*, 635 So. 2d 1134, 637 So. 2d 1065 (La. 1994)).

employee that the patient to whose body fluids the employee had been exposed had AIDS. An appellate court concluded that the wife's claim for fear of developing AIDS from the sexual relations with her husband did not fall within the employer's workplace immunity. These mental anguish claims, either "direct," as in *Vallery*,<sup>96</sup> or "bystander," pursuant to *Lejeune* and Article 2315.6, should not fall within the employer's immunity.

Through the lens of the ever-present duty/risk analysis, the consortium, mental anguish, and "independent tort" suits all present "this plaintiff" issues. Does this defendant, the employer, owe a tort duty to this non-employee plaintiff who is a relative of the employee? Do the policies underlying the employer's non-intentional tort immunity to the employee mandate or suggest the extension of the immunity to *this* plaintiff who is *not* an employee but is related to the employee? Not surprisingly, the manner of the occurrence and the injuries which occur may practically, if *not* logically, explain the results in particular cases. In the typical consortium case the "*manner*" of the injury is trauma to the worker caused by a non-intentional work place tort. The injuries suffered by the non-employee relative are indirect—they result solely from the employee's injuries, i.e., loss of society with or fear for the safety of the employee. Most courts have denied these claims against the employer. But in the "independent tort" suits the non-employee has his or her *own* injuries—i.e., fear of AIDS. *These injuries* are his or her *own* and *this manner* is such that the non-employee has suffered his or her *own* injuries. Courts have allowed *these* tort suits to proceed. Where do the Article 2315.6 cases fit? There, the non-employee's injuries do result from the work place injury itself *but* the non-employer's injuries are his or her own, albeit psychic. While courts have not faced these issues, they should allow the 2315.6 claims to proceed in tort.

In some jurisdictions an employer may not be immune from an employee's negligence action if the employer's fault is committed in some capacity other than as the injured worker's employer.<sup>97</sup> These usefully may be called "dual capacity" cases. In such cases while "this defendant" is an employer, the plaintiff alleges that because of the manner of the accident "this defendant" ought *not* be treated like an employer entitled to claim immunity, but as a non-employer. For tort purposes, the plaintiff alleges that defendant's capacity as tortfeasor should trump its capacity as employer. Perhaps the paradigm "dual capacity" case was where the plaintiff, employed as a sales person, was injured when the heel of a shoe she had purchased from her employer collapsed, causing her to fall on the employer's premises during her work shift. Plaintiff brought a tort action against her employer, arguing that the employer's immunity did not apply because she was suing it as the shoe's manufacturer and not as her

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96. The logic of *Vallery* is not limited to mental anguish cases but applies to other "direct" injuries as well. See *Trahan v. Trans-Louisiana Gas Co., Inc.*, 618 So. 2d 30 (La. App. 3d Cir. 1993).

97. See, e.g., *Shelly v. Johns Manville Corp.*, 798 F.2d 93 (3d Cir. 1986).

employer. Although some other states had accepted the "dual capacity" doctrine and arguably would have allowed the plaintiff's tort suit to proceed, the Louisiana appellate court rejected the doctrine and maintained the employer's tort immunity.<sup>98</sup> A few years later, however, the Supreme Court embraced the doctrine in *Ducote v. Albert*.<sup>99</sup> There the plant physician, a salaried employee, allegedly committed malpractice upon a co-employee who had suffered a workplace injury. The physician met the patient/employee's tort damage suit with the contention that if he were negligent, he was immune as plaintiff's co-employee. The Supreme Court rejected the defense, observing that:

The dual capacity doctrine comports with the policy of the Louisiana Worker's Compensation Law. . . . When a company doctor aggravates injuries suffered previously by an employee, it is not an inevitable risk inherent in the production process. The same risk would exist if the employee sought private treatment away from the workplace.<sup>100</sup>

In response to *Ducote*, the legislature in 1989 amended Louisiana Revised Statutes 23:1032 to provide that, "[t]his exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine."<sup>101</sup> The amendment came before the Supreme Court in *Stelly v. Overhead Door Company of Baton Rouge*.<sup>102</sup> There, the employer rented the workplace premises from the owner and, as is customary, contractually assumed responsibility for conditions of the premises pursuant to Louisiana Revised Statutes 9:3221.<sup>103</sup> Employee, injured because of an allegedly defective condition of the premises, sued the employer in tort. Employer contended that it was immune, and employee countered with the "dual capacity" doctrine. The Court imposed tort liability upon the employer, holding that the amendment to Louisiana Revised Statutes 23:1032 was not retroactive and that the pre-amendment immunity did not shield an employer who contractually assumed the liability of an otherwise liable third party for an unintentional tort. Critically, the court stated that the "dual capacity doctrine . . . has never encompassed *contractually assumed* liability. It has consistently been limited to situations involving *liability imposed by law* due to legal capacity or status in addition to that of employer."<sup>104</sup> Although *Stelly* applied the pre-amendment law, the result may be the same in post-

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98. *Tomasich v. United States Fidelity & Guaranty Co.*, 415 So. 2d 1002 (La. App. 4th Cir.), writ denied, 420 So. 2d 446 (1982). See also *Atchison v. Archer-Daniels-Midland Co.*, 360 So. 2d 599 (La. App. 4th Cir. 1978).

99. 521 So. 2d 399 (La. 1988).

100. *Id.* at 403.

101. La. R.S. 23:1032 (Supp. 1995).

102. The legislative abrogation of strict liability, 1996 La. Acts No. 1, has reduced the practical impact of La. R.S. 9:3221 (1991) and the decision in *Stelly*.

103. 646 So. 2d 905 (La. 1994).

104. *Id.* at 911.

amendment cases. In *Stelly* the Court observed in a footnote that: "we decline to address the impact of the post-amendment version [Louisiana Revised Statutes 23:1032] on this action and/or whether the statute refers to Louisiana's traditional dual capacity doctrine or a more expansive version of the doctrine."<sup>105</sup> The reference to the "traditional" dual capacity doctrine is no doubt a reference to dual capacity involving "*liability imposed by law*," not "*contractually assumed liability*." Restated slightly, if the employer has contractually assumed responsibility for the premises, the *manner* of the accident (and surrounding circumstances) is such that this defendant may *not* be treated as an employer, but rather as any other lessee.<sup>106</sup>

From a policy perspective, the result in *Stelly* may represent the best among a number of poor choices. The law should encourage the maintenance of a safe workplace by those who are in the best position to do so. Where the danger is a physical condition of the workplace premises, the employee usually is in a poor position to remedy the defect. The non-employer, lessor/owner of the premises may be in a better position than the employee, but imposing liability upon him would either erode the traditional relationship between lessor and tenant (to reduce its exposure, the lessor probably would retain significant control over the leased premises during the term of the lease), or would effectively place the burden upon the employer (the lessor would require employer indemnification funded by insurance). Moreover, the lessor may not be in a good position to detect and remedy any dangerous conditions caused by the employer/lessee's subsequent alteration of the premises. Thus, in many cases the employer is in the best position to guard against unreasonably dangerous conditions on the work premises. But, arguably, the employer's liability for worker's compensation does not provide him with sufficient incentive to significantly improve the safety of the workplace premises, because the employer faces only limited, and *not* full, liability under worker's compensation. Thus, the best choice may be to impose tort liability upon the employer.<sup>107</sup>

In *Wright v. State of Louisiana*,<sup>108</sup> an unusual case reminiscent of the dual capacity doctrine, the negligently injuring co-employees were denied immunity

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105. *Id.* at 912 n.9.

106. The *Stelly* approach, and the judicial limitation upon the "dual capacity" doctrine, may be stretched to extend to the not unusual cases in which the employer by contract assumes responsibility for the injuries to his employees. Because the employer has assumed by contract the principal's tort obligation to the employee, it may be argued under *Stelly* that he is not immune from a tort suit by the injured employee. Such a result would be unfortunate. See, e.g., *Harris v. Housing Authority of Mansfield*, 665 So. 2d 712 (La. App. 2d Cir. 1995).

107. This is arguably true in all cases, not just those where the employer has contractually assumed responsibility for the work premises under La. R.S. 9:3221 (1991). In a case involving a La. R.S. 9:3221 clause filed against the premises owner, the third circuit refused to give effect to the clause because to enforce the clause would impermissibly shift the employer's immunity from the employer lessee to the non-employer lessor. *Wallace v. Helmer Directional Drilling, Inc.*, 641 So. 2d 624 (La. App. 3d Cir. 1994).

108. 639 So. 2d 258 (La. 1994).

from a negligence action by their injured co-employee. The plaintiff, a hospital security guard, was injured in a compensable workplace accident which necessitated compensable surgery by a health care provider of plaintiff's choice. Plaintiff chose physicians who worked at the same hospital as he did, and they allegedly committed malpractice upon plaintiff. The court held that the physicians were not immune because plaintiff was not being treated by the doctors pursuant to a benefit or requirement of his employment. However, the case may best be explained on a "course and scope" basis, i.e., plaintiff was not engaged in employment at the time of the injury—the operation. The "manner" of the injury was such that tort, rather than immunity, governed.

Three other inroads into employer immunity deserve mention. In *Cox v. Glazer Steel Corp.*,<sup>109</sup> the employer refused to reemploy a worker who was handicapped; the "handicap" was caused by a prior workplace accident for which the employer had paid worker compensation benefits. The court held that the worker compensation immunity did not prevent the employee from recovering under the Civil Rights Act for Handicapped Workers. The policy of enforcing the Civil Rights Act overrule the immunity paradigm. In *Weber v. State*,<sup>110</sup> another case recognizing tort recovery against an employer, the court carved out what it called a "narrow" exception to tort immunity: where the employer, in bad faith, refuses to provide necessary medical treatment for a compensable injury. A third exception to the employer's immunity from negligence actions which will no doubt attract future attention is the employee's claim for spoliation arising from the employer's breach of a post-accident promise to preserve the remains of the accident-causing property for use in the employee's third party tort suit.<sup>111</sup>

An issue which has attracted extensive legislative and judicial attention in post-modern times is the determination of which persons are entitled to claim employer immunity. The question is a *this defendant* question. Is the defendant before the court entitled to be treated like an employer? Are the circumstances such that the defendant should be accorded "employer" status which then defines the duty owed—tort or compensation benefits? With several exceptions, an "employment relationship" must exist between the injured worker and the defendant. Thus the "payroll" (sometimes called direct or general) employer usually will be liable for compensation benefits (and immune from non-intentional tort liability) to his payroll employee accidentally injured in the course and scope of employment. If the injured worker (or his direct or general employer) is an independent contractor, the principal with whom the employer has contracted ordinarily is not liable for worker compensation and is not entitled to tort immunity.<sup>112</sup> The key factor that should distinguish an independent

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109. 606 So. 2d 518 (La. 1992).

110. 635 So. 2d 188 (La. 1994).

111. *Carter v. Exide Corp.*, 661 So. 2d 698 (La. App. 2d Cir. 1995).

112. One important exception to the rule stated in text arises where the independent contractor is engaged in manual labor. La. R.S. 23:1021(6) (1985).

contractor from an employee is whether the principal (putative employer) maintains the right to control the details of the work.<sup>113</sup> Exercise of actual control of the details of the work should not be required. On the other hand, the general right of control or final approval should not be sufficient. In many markets, the principal, through his economic power, will have the practical "say so" on many of the contractor's decisions about the work, but this should not translate into control of the details of the work. Even when there is a true principal/contractor relationship, the principal is liable for worker compensation benefits if a substantial part of the independent contractor's work time under the contract is spent in manual labor.<sup>114</sup> In such a case, the principal enjoys tort immunity.

Where the injured employee is not an independent contractor or the employee of an independent contractor, he usually will be a direct or "payroll" employee of the principal-employer, and, as noted, immunity applies if the injury occurs in the course and scope of employment and the injuring conduct is not intentional. There are two situations, however, in which one person may be liable for the worker compensation benefits due to the direct employee of another, and consequently, immune from a tort suit by that other's employee. One is when the principal becomes a "borrowing employer" of a direct or "payroll" employee of another.<sup>115</sup> This is one prong of the "borrowed servant" doctrine. For instance, it is a custom in the oil industry for "labor contractors" to provide crews of workers to drilling contractors. During their work shifts, the labor contractor's "employees" report to and perform the tasks assigned to them by the drilling contractor's supervisory employees. Under those circumstances, the drilling contractor clearly becomes the "borrowing employer," and is liable for worker compensation benefits (although the labor contractor usually secures compensation), and is entitled to immunity from tort liability. These ongoing relationships should be distinguished from others in which a contractor "loans" an employee to another contractor working on the same project to assist in the performance of a specific task or for a relatively brief period of time. That kind of short term "cooperation" between contractors may not create "borrowing employer" status and trigger immunity for the "borrower."<sup>116</sup> Determining when a servant becomes sufficiently "borrowed" to be considered a "borrowed servant" is not always easy. Some of the factors which have been suggested as dispositive include the length of time of the "loan," the employee's reasonable expectations under the circumstances, and the custom in that particular industry.

The other situation in which one may be liable for worker's compensation benefits to, and immune from, a non-intentional tort claim brought by a non-

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113. See *Hickman v. Southern Pacific Transport Co.*, 262 So. 2d 385 (La. 1972).

114. La. R.S. 23:1021(6) (1985).

115. See, e.g., *Brumbaugh v. Marathon Oil Co.*, 507 So. 2d 872 (La. App. 5th Cir.), writ denied, 508 So. 2d 824 (1987). See also *Billeaud v. Poledore*, 603 So. 2d 754 (La. App. 1st Cir.), writ denied, 608 So. 2d 176 (1992).

116. See, e.g., *Bertrand v. Howard Trucking Co., Inc.*, 427 So. 2d 40 (La. App. 3d Cir. 1983).

payroll employee is when the "statutory employer" doctrine applies.<sup>117</sup> Once again, the doctrine presents a *this defendant* question. The history of the "statutory employer" concept in Louisiana and in other states is helpful in understanding its reach. American legislatures which adopted worker compensation schemes during the first part of the twentieth century feared that employers would attempt to circumvent the absolute liability those schemes imposed by interjecting between themselves and their workers intermediary entities which would not secure compensation or otherwise meet an employer's worker compensation obligations.<sup>118</sup> To assure a compensation remedy to injured workers, legislatures provided that some principals were by statute deemed, for the purposes of liability for compensation benefits, the employers of employees of other entities. The legislative approaches varied. In many jurisdictions, the only "statutory employer" was a contractor who subcontracted out part of the work it had contracted to perform. Under this "two contract" theory, the general contractor is contingently liable for the worker compensation benefits of the subcontractor's employees and is entitled to tort immunity if he in fact is compelled to pay those benefits.

Louisiana adopted a broad version of the statutory employer concept, providing that a principal is liable for worker compensation benefits under the "two contract" theory *or* if the contract work is part of the principal's "trade, business, or occupation."<sup>119</sup> Most significantly, under the Louisiana version, the Supreme Court held, in *Thibodeaux v. Sun Oil Co.*,<sup>120</sup> that a defendant was immune from a tort suit as a "statutory employer" even though worker compensation benefits were in fact paid by the employee's direct or "payroll" employer and *not* by the statutory employer. Thus, the employer received the benefit of the immunity without directly paying compensation benefits.

In many cases, the "statutory employer" issue is easily resolved by application of the "two-contract" theory. However, where the person claiming the immunity is not a general contractor and the victim is not an employee of the subcontractor, immunity turns upon a determination of what is the principal's "trade, business or occupation." That determination has not been an easy one to make.<sup>121</sup>

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117. La. R.S. 23:1032, 1061 (Supp. 1995). This defense is also known as the "Section 6" employer, in memory of the section of the original worker's comp section which created the "statutory employer." See, e.g., *Berry v. Holston Well Service, Inc.* 488 So. 2d 934 (La. 1986).

118. See, e.g., *Rowe v. Northwestern National Ins. Co.*, 471 So. 2d 226, 229 (La. 1985).

119. La. R.S. 23:1061 (Supp. 1995).

120. 218 La. 453, 49 So. 2d 852 (1950).

121. The difficulty in defining a vague phrase like "trade, business or occupation" coupled with the automatic immunity available without the actual payment of benefits have made the "statutory employer" doctrine one of the most litigated in Louisiana workplace tort suits. Those suits and the legislative response to them have become a crucial battlefield, both in the legislative and judicial arenas, between the competing interests of business and labor. *Barnes v. Sun Oil Co.*, 362 So. 2d 761 (La. 1978).

The Supreme Court's early struggles with the issue generated what are arguably two lines of authority: a principal is a statutory employer of the plaintiff if the work in which the plaintiff (or his employer) was engaged (the contract work) was (1) an "essential" or "integral" part of the principal's business,<sup>122</sup> or (2) was "customarily" done by the principal and/or by others similarly situated.<sup>123</sup> One could persuasively argue that the "essential" and "integral" tests were different, and that there were really three lines of authority. However, most courts assumed that the words "integral" and "essential" were alternative methods of describing the same concept.<sup>124</sup> Importantly, the "integral/essential" test often led to a broad immunity, as courts reasoned that any work which was necessary to allow the principal to engage in its trade, business, or occupation was part of that trade, business, or occupation.

In *Blanchard v. Engine & Gas Compressor Services, Inc.*,<sup>125</sup> the United States Fifth Circuit perceived a conflict in the jurisprudence between the "integral/essential" and "customary" tests and by certified question asked the State Supreme Court to answer this question:

1. What is the effect of *Reeves v. Louisiana and Arkansas Ry.*, 282 So. 2d 503 (La. 1973), on the "essential to business test?" See *Freeman v. Chevron Oil Co.*, 517 F.2d 201 (5th Cir. 1975); *Arnold v. Shell Oil Co.*, 419 F.2d 43 (5th Cir. 1969).

a. In determining whether a plaintiff is a statutory employee under La. Rev. Stat. Ann. § 23:1061, would the Louisiana Supreme Court use that test to determine whether certain activity is "part [of an employer's] trade, business, or occupation?"<sup>126</sup>

The Supreme Court's response was puzzling: "Decline. The jurisprudence of this Court does not warrant an additional pronouncement at this time. See *Reeves v. Louisiana and Arkansas Ry.*, 282 So. 2d 503 (La. 1973); *Lushute v. Diesl*, 354 So. 2d 179 (La. 1978); La. Sup. Ct. Rules XII, Sec. 1."<sup>127</sup>

The *Reeves* case was the one which arguably had substituted the "customary operations" test for the "essential/integral" test. The *Lushute* case, as the Fifth Circuit subsequently pointed out,<sup>128</sup> did not appear relevant to the question.

With the proverbial "ball" back in its court, the Fifth Circuit fashioned this test for "trade, occupation or business": the "essential to business test" was no longer controlling but was merely a factor to be considered. The first consideration was whether the particular principal involved customarily did the type of work performed by the contractor, or whether the contractor's work was an

122. *Thibodeaux v. Sun Oil Co.*, 218 La. 453, 49 So. 2d 852 (1950).

123. *Reeves v. Louisiana and Arkansas Ry.*, 282 So. 2d 503 (La. 1973).

124. *Id.*

125. 590 F.2d 594 (5th Cir. 1979).

126. *Id.* at 598.

127. *Blanchard v. Engine & Gas Compressor Services*, 371 So. 2d 265 (La. 1979).

128. *Blanchard v. Engine & Gas Compressor Services*, 613 F.2d 65, 69 n.6 (5th Cir. 1980).



integral part of the work customarily performed by the principal, and if either situation existed, there was a statutory employment relationship. If not, then the court had to determine if others engaged in businesses similar to that of the principal customarily did the type of work or if it was an integral part of their businesses.<sup>129</sup>

In the ensuing years, many Louisiana courts applied the *Blanchard* test in deciding the "trade, occupation or business" issue. Then, in 1986, the Supreme Court confronted the issue in *Berry v. Holston Well Service, Inc.*,<sup>130</sup> The *Berry* court propounded this test:

1) The first inquiry was whether the contract work was "specialized per se." This was a question of fact, determined by a consideration of whether the work required a degree of skill, training, experience, education and/or equipment not normally possessed by those outside the contract field. If the work was specialized per se, the defendant was *not* a statutory employer.

2) If the contract work was not "specialized per se," the contract work was to be compared with the principal's trade, business, or occupation, to determine if the former was part of the latter. Among the guidelines in resolving this factual issue:

a. Was the contract work routine and customary, i.e., "regular and predictable?"

b. Did the principal have the equipment and/or manpower capable of performing the contract work? ("Here the primary focus is on determining whether the contract work as relates to the principal is handled ordinarily through employees."<sup>131</sup>)

c. Did industry participants normally contract out this type of work, or did they have their own employees perform this work?

3) Finally, the principal must have been engaged in the work at the time of the alleged accident. If it was not, then the defendant could *not* be a statutory employer.

The advantage of the *Berry* test was that it provided some certainty. The first ("specialized per se") and third (engaged at the time of injury) inquiries were "litmus" tests. If either one of those tests was resolved against the defendant, he was *not* a statutory employer. The middle prong, resembling the *Reeves/Blanchard* test, was a flexible, multi-factor test. The difficulty with the *Berry* test was that the first and third prongs might lead to the denial of immunity for work which was clearly part of the principal's trade, occupation or business.

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129. *Id.* at 71.

130. 488 So. 2d 934 (La. 1986).

131. *Id.* at 938.

Post-*Berry* jurisprudence focused primarily upon the first prong, and there was a plethora of judicial decisions classifying certain work as specialized per se or not. Before the Supreme Court had the opportunity to untangle these and other issues raised by *Berry*, the legislature stepped in. In 1989, it amended Louisiana Revised Statutes 23:1061<sup>132</sup> to provide that:

The fact that work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.<sup>133</sup>

The language of the amendment may have been a carefully chosen compromise but if it was intended to overrule *Berry*, it was at best inartfully drafted. First, the legislature arguably amended the wrong statute. It is not Louisiana Revised Statutes 23:1061 but Louisiana Revised Statutes 23:1032 which provides immunity to the statutory employer. The legislature did not amend Louisiana Revised Statutes 23:1032, so the language of that statute (in this relevant respect) is the same as it was when *Berry* was decided. Secondly, the language does *not* reject the *Berry* factors, but simply provides that no one of those factors shall "prevent the work . . . from being considered part of the principal's trade, business or occupation."

The statute does make one clear change: the "litmus" aspects of the first and third prongs of the *Berry* test are no more. Beyond that, it was not clear what the 1989 amendment meant. The U.S. Fifth Circuit, without bothering to certify the question, concluded that after the 1989 amendment the *Berry* factors could not even be considered by a court in determining the statutory employer issue.<sup>134</sup> That conclusion was not dictated by the language of the amendment and was counterintuitive. The *Berry* factors arguably were the only ones relevant to an assessment of the connexity of the principal's work to that of the contractor. It is significant to note that the Fifth Circuit concluded that the 1989 amendment was intended to restore the pre-*Berry* "integral/essential" test pronounced by the state Supreme Court in *Thibodaux* in 1950. However, the *Berry* factors were developed by courts applying that same "integral/essential" test to frequently recurring fact situations. The Fifth Circuit's decision also was ironic because it foreclosed application of the *Blanchard* test which it developed and which generally was accepted by Louisiana courts before *Berry*.

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132. 1989 La. Acts No. 454.

133. La. R.S. 23:1061 (Supp. 1996).

134. *Morgan v. Gaylord Container Corp.*, 30 F.3d 586 (5th Cir. 1994); *Salsbury v. Hood Industries, Inc.*, 982 F.2d 912 (5th Cir. 1993). See also *Harris v. Murphy Oil Co., U.S.A.*, 980 F.2d 991 (5th Cir. 1992); *Kinsey v. Farmland Industries, Inc.*, 39 F.3d 603 (5th Cir. 1994).

As they did with *Blanchard*, the state's lower courts generally followed the U.S. Fifth Circuit's lead and applied *Thibodaux* and the "integral/essential" test.<sup>135</sup> They regularly granted and affirmed summary judgments, determining defendants were entitled to immunity as "statutory employers."<sup>136</sup> Just as regularly, the Supreme Court reversed those summary judgments and exceptions of no cause of action.<sup>137</sup> However, the Supreme Court had summarily done so, without docketing the cases or hearing argument. Then, a divided five-judge panel of the Second Circuit decided *Kirkland v. Riverwood International USA, Inc.*<sup>138</sup> That court concluded that in determining the statutory employer issue, a court was not precluded from considering the *Berry* factors but should decide the "statutory employer" issue based on the "totality of the circumstances," including the factors identified in the middle prong of the *Berry* test. The Supreme Court granted writs and affirmed.<sup>139</sup>

In affirming, the Supreme Court endorsed the logic and spirit of the court of appeal decision. The court held that the 1989 amendment to Louisiana Revised Statutes 23:1061, rather than returning Louisiana to the "integral" or "essential to the business" test, primarily was intended to overrule that part of *Berry* "dealing with specialization per se and to declare that a finding of specialization is not determinative of a statutory employment relationship."<sup>140</sup> The court concluded that the "appropriate standard under amended Section 1061 for determining whether the contract work is part of the principal's trade, business or occupation is for the court to consider all pertinent factors under the totality of the circumstances."<sup>141</sup> Giving lower courts further guidance, the court listed the relevant factors for consideration:

- (1) The nature of the business of the alleged principal;
- (2) Whether the work was specialized or non-specialized;

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135. See *Deal v. International Paper Co.*, 632 So. 2d 870 (La. App. 2d Cir.), *rev'd*, 637 So. 2d 453 (1994); *Hanks v. Shell Oil Co.*, 631 So. 2d 1189 (La. App. 5th Cir.), *rev'd*, 635 So. 2d 1118 (1994); *Picard v. Zeit Petroleum Exploration Co., Inc.*, 636 So. 2d 922 (La. App. 1st Cir.), *rev'd*, 642 So. 2d 862 (1994); *Moore v. Crystal Oil Co.*, 626 So. 2d 792 (La. App. 2d Cir. 1993), *rev'd*, 632 So. 2d 758 (1994). The court concluded there were factual issues which precluded summary judgment. Various justices (Retired Justice Hall, Justice Kimball, and Chief Justice Calogero) have argued that the cases should be docketed for full argument. Despite these summary reversals at least one court of appeal has adhered to the integral relation test. *McNally v. Teledyne Movable Offshore, Inc.*, 650 So. 2d 267 (La. App. 1st Cir. 1994). Cf. *Favron v. Gulf States Utilities Co.*, 649 So. 2d 983 (La. App. 1st Cir. 1994) (factual issues prevent summary judgment on statutory employer defense). See also *Moffett v. Buck Kreihns Co., Inc.*, 654 So. 2d 798 (La. App. 4th Cir.), *writ denied*, 656 So. 2d 1021 (1995) (night security at a dock is part of vessel repairer's trade, business, or occupation).

136. See *supra* note 134.

137. See *supra* note 135.

138. 658 So. 2d 715 (La. App. 2d Cir.), *writ granted*, 661 So. 2d 1370 (1995).

139. *Kirkland v. Riverwood International USA*, No. 95-C-1830, 1996 WL 523694 (La. Sept. 13, 1996). Justice Kimball, *id.* at \*\*8 (Kimball, J., dissenting), and Justice Victory, *id.* at \*\*10 (Victory, J., dissenting), dissented.

140. *Id.* at \*\*7.

141. *Id.*

- (3) Whether the contract work was routine, customary, ordinary, or usual;
- (4) Whether the alleged principal customarily used his own employees to perform the work, or whether he contracted out all or most of such work;
- (5) Whether the alleged principal had the equipment and personnel capable of performing the contract work;
- (6) Whether those in similar businesses normally contract out this type of work or whether they have their own employees perform the work;
- (7) Whether the direct employer of the claimant was an independent business enterprise who insured his own workers and included that cost in the contract; and
- (8) Whether the principal was engaged in the contract work at the time of the incident.<sup>142</sup>

Noting the fact intensive nature of the inquiry, the court expressly referred to the issue of statutory employer status as a "factual issue to be resolved on a case-by-case basis."<sup>143</sup> As such, the court noted that the statutory employer inquiry would be "frequently difficult to accomplish on motion for summary judgment. . . ."<sup>144</sup>

The apparent inability of both the legislature and the judiciary to stabilize the law governing the "statutory employer" defense may be due, in part, to the perplexing policy choices it presents. The apparent reason for creating the defense was the *quid pro quo*, i.e., imposition of liability for worker compensation benefits upon a principal who chose to do part of his business through a separate and independent business entity which was unable to pay those benefits to its injured employees. But that is no longer a societal problem. In nearly all cases, the injured employee's direct employer will have secured compensation; rarely is a contractor permitted to commence work upon the principal's premises without first proving that he has done so.

Resort to policy does not produce any clear answer. The injured employee will, in almost all cases, be entitled to worker compensation benefits. But worker's compensation provides only limited compensation. Thus, one real issue is full compensation to the injured employee. The countervailing fairness argument is that the statutory employer in reality may pay at least a part of the employee's worker compensation through the contract price with the direct employer. Yet, if the principal is not given immunity, then he, unlike the direct employer, is liable for non-intentional torts to the employee. If, as one ordinarily can assume, the cost of worker compensation benefits is passed to the principal through the contract price (see the *Kirkland* court's seventh factor), then the risk

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142. *Id.* at \*\*8.

143. *Id.*

144. *Id.*

of the employee's injury is being borne by the enterprise in which the principal is engaged, regardless of how closely it is connected with that enterprise.

Another relevant factor is deterrence of workplace accidents. The principal in fact exercises some control over the workplace, but in many instances he cannot be expected to know whether the direct employer is conducting the operation in as safe a manner as possible. One of those instances is when the direct employer's work is "specialized." *Berry* denied statutory employer status where the work was specialized and the principal engaged the direct employer to perform it because the principal had no idea how it could safely be done. However, *Berry's* comparison with the actions of others in the industry on non-specialized work could make the principal immune although he was in a better position than the direct employer to avoid the harm. Thus, the "trade, business, or occupation" tests which developed may have immunized the principal when he was in a position to avert the workplace accident and impose tort liability upon him when he was not! Whether *Kirkland's* totality of the circumstances test avoids this potential pitfall remains to be seen.

Perhaps the real difficulty with the "statutory employer" defense is that it is a fact-specific inquiry and, thus, may not be the proper subject for a categorical "immunity" defense. If the principal is not treated as an immune statutory employer, a fact-specific inquiry must be made to determine if, under all of the circumstances, his conduct (or inaction) presented an unreasonable risk of harm to the employee. As *Kirkland* recognizes, whether the work was specialized and whether the principal also engaged in it with its own workers at the particular time should be relevant to that inquiry. However, it may be simpler and more analytically honest to simply ignore the immunity issue and treat the entire issue as a negligence question. However, the statutory basis of the statutory employer doctrine makes this simpler approach unavailable.

What if the workplace accident or the employment relationship has connections with more than one sovereign? For example, an employee may be hired in Louisiana to perform work in Texas. What if the laws of the two states provide differing tort immunities to the direct employer, or different standards for determining "borrowing employer" or the "statutory employer" status? The issue will be resolved by application of Louisiana's new choice of law rules.

A more common problem in Louisiana is when the workplace accident or the employment relationship, or both, have connections with both Louisiana and maritime law. A maritime worker may be either a seaman, entitled to benefits under the Jones Act,<sup>145</sup> or a worker covered by the Longshore and Harbor Worker's Compensation Act.<sup>146</sup> Under the Jones Act, the employer is liable to the employee in tort;<sup>147</sup> immunity is not an issue. Under the LHWCA,

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145. 46 U.S.C. App. § 688(a) (1994).

146. 33 U.S.C. §§ 901-950 (1994).

147. The Jones Act adopts for seamen provisions of the Federal Employer's Liability Act, 45 U.S.C. §§ 51, et seq, which make the employer liable for tort damages if his negligence injures his employee in the course and scope of the employment.

however, the employer is liable for compensation benefits but is immune from tort liability to the employee.<sup>148</sup> The LHWCA provides a comparatively narrow "statutory employer" defense—a principal is a "statutory employer" only if he is a contractor and plaintiff is an employee of his subcontractor, and only if the contractor is in fact required to pay compensation benefits to the subcontractor's employee.<sup>149</sup> If a worker is injured in a maritime tort setting and the worker is covered only by the LHWCA, the state statutory employer defense is inapplicable. But what if the worker is covered by both the LHWCA and state worker compensation? What if the injury occurs in circumstances in which the tort is maritime? In which it is not? These scenarios have presented perplexing problems, but final resolution apparently is at hand. Louisiana Revised Statutes 23:1035.2 provides that a worker is not entitled to state worker compensation if he is covered by a federal compensation scheme, including the LHWCA. Thus, in theory, there can be no overlapping coverage. The remaining problem is where the worker is covered by the LHWCA and is injured under circumstances in which his underlying tort claim against a third person is governed by state law, such as an injury on a fixed platform on the Outer Continental Shelf or on a dock or wharf. While the law is not clear, the emerging rule apparently is that the LHWCA's statutory employer immunity will apply and will preempt the application of the state statutory employer defense.<sup>150</sup>

### III. CONCLUSION

The employer's immunity from tort is the most significant immunity issue Louisiana courts face. It is the most widely applicable immunity and the most frequently litigated. The litigation and resolution of these employment immunity issues reveal the difficulties, both practical and philosophical, of attempting to untie the knots at the borders where fault and no fault systems intertwine. However, the employer immunity is also critical because it is the paradigm for post-modern immunity statutes: the employer is liable for certain of his torts but not all, i.e. the employer is immune from a negligence suit by its employer or a strict liability suit but *not* an intentional tort suit. As such, the employer immunity has provided the model for Louisiana's new wave of immunity statutes which immunize various groups from liability for certain torts but not others.<sup>151</sup> Additionally, as in all torts problems, the employer immunity setting presents fine issues regarding the existence of a duty and its scope. Most notably, employer immunity issues involve the *manner* in which the accident occurred and whether a person, *this defendant*, should be accorded employer status for

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148. 33 U.S.C. §§ 904, 905 (1994).

149. *Id.*

150. *See, e.g.,* Grantham v. Avondale Indus., Inc. 964 F.2d 471 (5th Cir. 1992); *Strange v. Fidelity & Casualty Company of New York*, 262 So. 2d 799 (La. App. 3d Cir. 1972).

151. *See, e.g.,* La. R.S. 9:571 (1991).

purposes of the immunity. Finally, and perhaps most importantly, resolution of the employer immunity issues—course and scope, coverage, and who is entitled to immunity—reveal a lot about how the Louisiana courts, most notably the Supreme Court, have responded to limitations on tort recovery.